UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHAMROCK FOODS COMPANY

and **Case 28-CA-150157**

BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC

GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE

Administrative Jeffrey Wedekind (the "ALJ") heard this case on 7 days between September 8 and September 16, 2015, and issued a decision and recommended order on February 11, 2016. The ALJ in large part found that Respondent Shamrock Foods Company (Respondent) violated the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq.*, as alleged in the Complaint. In particular, the ALJ found that during an organizing campaign conducted by Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union No. 232, AFL-CIO-CLC (the Union), Respondent committed a barrage unfair labor practices aimed at extinguishing the campaign. The ALJ found, among other things, that Respondent threatened employees, told employees that supporting the Union will be futile, coercively interrogated employees, engaged in unlawful surveillance, confiscated Union flyers, instructed employees to report other employees' Union activities, promised and granted employees benefits to discourage Union support, disciplined an employee because of his Union activities, and discharged its employee Thomas Wallace (Wallace) because of his Union activities. As fully set forth in the General Counsel's concurrently-filed Answering Brief to Respondent's exceptions, the General Counsel supports these findings.

However, pursuant to Section 102.46(e) of the Rules and Regulations of the National Labor Relations Board (the Board), the General Counsel respectfully takes limited exception to certain of the ALJ's rulings, findings, conclusions, and recommended remedies. The General Counsel specifically excepts to the ALJ's findings that Respondent's promulgation and maintenance of certain rules in its Associate Handbook and in a Separation Agreement interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act, and to the ALJ's failure to failure to include in his

recommended Order a requirement that Respondent reimburse discriminatee Thomas Wallace (Wallace) for all search-for-work and work-related expenses regardless of whether Wallace received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period. The General Counsel respectfully requests that the Board grant the General Counsel's limited cross-exceptions, reverse the portions of the ALJ's decision to which the General Counsel has excepted, and provide a full and appropriate remedy for all of Respondent's unfair labor practices.

II. QUESTIONS INVOLVED AND TO BE ARGUED

The General Counsel's cross-exceptions present the following questions:

(a) Did the ALJ err by failing to find that Respondent's rule entitled, "Requests by Regulatory Authorities," interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act? (Cross-Exceptions 1 and 8, addressed in Section III.A below)

(b) Did the ALJ err by failing to find that Respondent's rule entitled, "Company Spokespeople," interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act? (Cross-Exceptions 2 and 8, addressed in Section III.B below)

(c) Did the ALJ err by failing to find that Respondent's rule entitled, "Monitoring Use," interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act? (Cross-Exceptions 3 and 8, addressed in Section III.C below)

(d) Did the ALJ err by failing to find that the portion of Respondent's rule entitled, "No Solicitation, No Distribution," requiring employees to seek Respondent's approval to post materials on Respondent's bulletin boards interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act? (Cross-Exceptions 4 and 8, addressed in Section III.D below)

(e) Did the ALJ err by failing to find that Respondent, by maintaining policies in its Associate Handbook, threatened its employees with discipline and/or discharge for violating the overly-broad and discriminatory rules described

in paragraphs 5(b)(5) and 5(b)(9) through 5(b)(12) of the Complaint? (Cross-Exceptions 6 and 8, addressed in Section III.E below)

(f) Did the ALJ err by failing to find that a confidentiality provision in Respondent's Separation Agreement interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act? (Cross-Exceptions 7 and 8, addressed in Section III.F below)

(g) Did the ALJ err by failing to include in his recommended Order a requirement that Respondent reimburse discriminatee Wallace for all search-for-work and work-related expenses regardless of whether Wallace received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period? (Exception 9, addressed in Section III.G below)

Each of these questions is addressed in turn below.

III. ARGUMENT

A. Respondent's Requests by Regulatory Authorities Rule Is Overly-Broad and Discriminatory

Respondent's Associate Handbook includes a section entitled, "Handling the Confidential Information of Others," which includes a subsection entitled "Requests by Regulatory Authorities," which states:

> The Company and its associates must cooperate with appropriate government inquiries and investigations. In this context, however, it is important to protect the legal rights of the Company with respect to its confidential information. All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department. No financial information may be disclosed without the prior approval of the Company's President or Chief Financial Officer.

(ALJD 47:10-47:20)

The ALJ found that an employee would not reasonably understand the above provision, read in its entire context, to require employees to refer requests for documents or testimony by the Board to Respondent because the section in which it appears begins with an introductory paragraph that "indicates that it deals only with confidential information provided to the

Company by 'third party' companies and individuals that the Company has, or may eventually have 'business relationships' with." (ALJD 47:37-47:40)

The General Counsel respectfully takes exception to that finding. The Board has held that rules requiring employees to refer requests for information by government agencies to their employers are unlawful because they interfere with employees' participation in Board processes. *DirecTV*, 359 NLRB No. 54, slip op. at 2-3 (2013), reaffd. 362 NLRB No. 48, slip op. at 1 (2015). An employee consulting Respondent's Associate Handbook would reasonably understand Respondent's Requests by Regulatory Authorities rule to do just that. The rule is broadly worded, requiring referral of "[a]ll government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department."

Contrary to the ALJ's finding, the first paragraph of the section in which this instruction appears does not indicate that the entire section applies only to information provided by third party companies and individuals with whom Respondent has business relationships. Rather, the entire section is broadly labeled, "Handling Confidential Information of Others," and the introductory paragraph consists of a narrative explanation of the fact that Respondent "has many kinds of business relationships with many companies and individuals" and that it sometimes receives "confidential information" from such "third parties." The term "business relationship with…individuals" is broad and ambiguous and would reasonably be understood by employees to encompass an employment relationship. Moreover, even if an employee would not reasonably understand that term to encompass an employment relationship, nothing in the introductory paragraph states that the provisions that follow apply only to information about "companies and individuals" with whom it has "business relationships," and opposed to all "others" generally. Thus, at best, the context of Respondent's Requests by Regulatory Authorities rule gives rise to

an ambiguity that must be construed against Respondent as the employer that promulgated it. *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (Sept. 11, 2012), *aff'd in relevant part*, 198 LRRM 2789 (5th Cir. 2014); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

B. Respondent's Company Spokespeople Rule Is Overly-Broad and Discriminatory

The section of Respondent's entitled, "Handling the Confidential Information of Others," also includes a subsection entitled "Company Spokespeople," which states:

> The Company has an established Spokesperson who handles all requests for information from the Media. Ms. Sandra Kelly at the Dairy is the person who has been designated to provide overall Company information or to respond to any public events or issues for which we might receive press calls or inquiries. If you believe that an event or situation may result in the press seeking additional information, please contact Ms. Kelly at the Dairy to advise her of the nature of the situation so that she may be prepared for any calls. Only the Company's CEO may authorize another associate to speak on behalf of the Company.

(ALJD 48:5-48:15)

The ALJ found that an employee would not reasonably understand this rule to require them to report to Respondent that it may receive press calls or inquiries about employees' protected activities because it appears in a section that "is limited to confidential information provided to the Company by 'third party' companies and individuals that the Company has, or may eventually have, 'business relationships' with." (ALJD 48:17-48:24)

The General Counsel takes exception to that finding. It is well settled that employees have the right to publicize matters related to their terms and conditions of employment, including through the press, and that rules interfering with the exercise of that right are unlawful. *See Sheraton Anchorage*, 359 NLRB No. 95, slip op. at 3 fn. 8 (2013); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004). Further, as noted above, employers violate the Act when they ask their employees to ascertain and disclose the membership, activities, and sympathies of other employees. *See, e.g.*,

Bloomington-Normal Seating Co., 339 NLRB at 193; *Arcata Graphics/Fairfield, Inc.*, 304 NLRB 541; *Sunbeam Corp.*, 284 NLRB at 997. By requiring employees to report events or situations that may result in the press seeking additional information, Respondent's rule would reasonably be understood to require employees to report plans by employees to engage in activities to publicize matters related to their terms and conditions of employment or related to a union organizing campaign. The knowledge that failing to report such plans to Respondent is a violation of Respondent's rules, and the knowledge that other employees may report plans to engage in protected activities, would deter employees from participating in such activities, thus interfering with the exercise of their Section 7 rights.

As explained in more detail above in paragraph III.A, the introductory paragraph of the section in which this rule appears does not indicate that the entire section applies only to information provided by third party companies and individuals with whom Respondent has business relationships, and, at best, the introductory paragraph gives rise to an ambiguity that must be construed against Respondent as the employer that promulgated it. *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2; *Lafayette Park Hotel*, 326 NLRB at 828.

C. Respondent's Monitoring Use Rule Is Overly-Broad and Discriminatory

A different section of Respondent's Associate Handbook entitled, "Electronic and Telephone Communications includes a subsection entitled "Monitoring Use" that reads, in relevant part:

> To ensure that the use of electronic and telephonic communications systems and business equipment is consistent with Shamrock legitimate business interests, authorized representatives of Shamrock may monitor the use of such equipment from time to time. This includes monitoring internet usage of any kind. This may also include listening to stored voicemail messages. In some functions, telephone monitoring is used to assist in associate training and the development of quality customer service: The associate will be notified if telephone monitoring is applicable to their area.

> In addition, Shamrock reserves the right to use software and blog-search tools to monitor comments or discussions about company representatives, customers, vendors, other associates, the company and its business and products, or competitors that associates or non-associates post anywhere on the Internet, including in blogs and other types of openly accessible personal journals, diaries, and personal and business discussion forums.
>
> *Shamrock cautions that associates should have no expectation of privacy while using company equipment and facilities for any purpose.*

(ALJD 49:13-49:33)

The ALJ found that this provision is lawful because the introductory paragraphs of the section in which it appears and the first and third paragraphs of the subsection itself "indicate that the subsection only applies to company computer and email systems," and the Board found in *Purple Communications*, 361 NLRB No. 127, slip op. at 15-16 (Dec. 2, 2014), that employers can monitor their email systems for legitimate management reasons and can notify their employees that they will do so. (ALJD 49:37-50:6)

The General Counsel respectfully excepts to this finding. This rule is unlawful because it creates the impression that Respondent will engage in surveillance of employees' protected activities on the Internet. In *Purple Communications,* the Board stated that its decision did not prevent employers from "continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability," and it also stated that employers are not ordinarily prevented from notifying employees that they monitor computer and email use for legitimate management reasons, such that employees had no expectation of privacy in their use of the employers' email systems. 361 NLRB No. 127, slip op. at 15-16. However, the Board also stated that allegations of surveillance of protected activities would continue to be assessed using the same standards applied "in the bricks-and-mortar world," explaining:

> Board law establishes that "those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them. The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not 'do something out of the ordinary.'" An employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.

Id. at 15.

Respondent's reservation of the right to "use software and blog-search tools to monitor comments or discussions about company representatives…other associates, the company and its business…that associates or non-associates post anywhere on the Internet, including in blogs and other types of openly accessible personal journals, diaries, and personal and business discussion forums" goes beyond the bounds delineated in *Purple Communications*. See *id.* at slip op. at 15-16. The provision gives absolutely no indication that Respondent will limit its monitoring to legitimate management reasons, thus conveying the impression that Respondent could monitor employees' online communications for any reason, including for the purpose of engaging in surveillance of their Section 7 activities.

Moreover, although the ALJ found that the context of Respondent's reservation of the right to monitor employees' comments and discussions makes it clear that the section applies only to communications through the Employer's computer and email system, based on the wording of the subsection itself, an employee would reasonably understand it to apply not just to employee use of Respondent's computer and email system, but also to all Internet communications mentioning Respondent or its employees. In particular, the provision's use of the terms "blog-search tools" and "anywhere on the Internet, including in blogs and other types of openly accessible personal journals, diaries, and personal and business discussion forums" make it clear that the rule is intended to encompass all postings or communications related to Respondent, its representatives,

and its employees on the Internet, not just those posted or communicated using Respondent's computer or email system. Notably, Respondent would not need to use a "blog-search tool" to monitor communications or posts using its computer or email system.

Thus, employees reading this provision would reasonably understand it to mean that Respondent is reserving the right to monitor their protected comments and discussions on their personal social media accounts, as well as on other websites, such as labor organizations' websites, websites of news organizations, and other online forums. As with Respondent's other overly-broad and discriminatory rules, at best, the context of this provision gives rise to an ambiguity that must be construed against Respondent as the employer that promulgated it. *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2; *Lafayette Park Hotel*, 326 NLRB at 828. The rule therefore interferes with employees' exercise of their rights under Section 7 of the Act.

D. The Portion of Respondent's No Solicitation, No Distribution Rule Requiring Employees to Seek Respondent's Approval to Post Materials on Respondent's Bulletin Boards

Respondent's Associate Handbook also includes a section entitled "No Solicitation, No Distribution," which states, in relevant part:

> It is important that we keep our associates informed on all matters that involve them. Company bulletin boards/email is our primary means for posting notices and other materials related to our associates and our business. In order to avoid any confusion over what may or may not be posted on Shamrock bulletin boards, and to avoid obscuring important business-related materials with items which are of a personal nature, Shamrock bulletin boards are to be used solely for the posting of Shamrock business-related notices and materials. If you would like to post any Shamrock business-related materials, please see your Department Manager, the General Branch Manager or the Human Resources Representative. Only these Individuals are authorized to approve and post information on Shamrock bulletin boards.

(ALJD 57:9-57:37)

Although the ALJ found other aspects of Respondent's No Solicitation, No Distribution rule to be unlawful, he found that the above provision is lawful because "the law permits and

employer to prohibit employees from posting materials anytime and anywhere in the facility as long as the employer does not apply the ban in a discriminatory manner." (ALJD 58:17-27)

The General Counsel respectfully excepts to this finding. The General Counsel acknowledges that the Board has held that employers are permitted to completely prohibit employees from posting materials at their facilities. *Flamingo Hilton*, 330 NLRB 287, 293 (1999). However, Respondent's ban is not a complete ban on postings. Rather, it is a requirement that employees seek authorization from Respondent in order to post materials on its bulletin board. While Respondent's rule on its face does not explicitly ban posting of Section 7 protected communications, by requiring employees to get Respondent's approval before posting any materials, it would reasonably deter an employee from posting Section 7 related communications. Employees wishing to post other communications, such as announcements by employees about activities or events for employees would not be so deterred. Thus, in effect, the rule is discriminatory.

E. Respondent's Associate Handbook Explicitly Threatens Employees with Discipline and Discharge for Violating Its Overly-Broad and Discriminatory Rules

Following a section containing many of the overly-broad and discriminatory provisions in Respondent's Associate Handbook are two provisions threatening that employees could be disciplined, up to and including discharge, for violating those rules. In particular, there is a provision entitled "Discipline for Violations" stating, "Associates who violate this policy are subject to disciplinary action, up to and including termination." (GC 3, p. 63) Later, in a list of "the types of behavior and conduct that Shamrock considers inappropriate and grounds for disciplinary action up to and including termination of employment without prior warning," Respondent includes the following: "Violation of any of the work rules or Policies outlined in

this Handbook, including but not limited to the …no-solicitation or distribution Polic[y]." (GC 3, p. 63) Threats of discharge for violating overly-broad rules interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. *W.D. Manor Mechanical Contractors, Inc.*, 357 NLRB No. 128, slip op. at 26 (Dec. 7, 2011); *The Roomstore*, 357 NLRB No. 143 (Dec. 20, 2011). Thus, the threats in Respondent's Associate Handbook are unlawful.

F. The Confidentiality Provision in Respondent's Separation Agreement Is Overly-Broad and Discriminatory

After unlawfully discharging discriminatee Wallace, Respondent presented Wallace with a Separation Agreement including a release of claims and an agreement not to seek future employment with Respondent or its affiliates or subsidiaries. (GC 26) Among other overly-broad and discriminatory terms, the Separation Agreement included the following term:

> 9. Because the information in this Separation Agreement is confidential, it is agreed that you will not disclose the terms of this Separation Agreement to anyone, except that you may disclose the terms of this Separation Agreement to your family, your attorney, your accountant, a state unemployment office, and to the extent required by a valid court order or by law.

(ALJD 44:22-44:29)

The ALJ found that this provision was not unlawful because it does not prohibit Wallace from discussing his discharge, and instead is limited to prohibiting disclosure of the terms of the Separation Agreement. (ALJD 44:35-39)

The General Counsel respectfully excepts to this finding. Respondent's inclusion of this term in the Separation Agreement must be viewed in its context. Respondent presented the Separation Agreement to Wallace after discharging him for engaging in union and protected concerted activities soon after an incident in which he spoke up and complained about Respondent's health insurance policy in front of all of Respondent's warehouse employees and managers at a mandatory meeting. (ALJD 36:12-42:29) The Separation Agreement as a whole

was aimed at erasing Wallace and the message he sent to other employees. The Separation Agreement, by incorporating a release of claims and an agreement not to seek future employment with Respondent or its affiliates or subsidiaries, would guarantee Wallace's permanent removal from the workplace. (GC 26) Provisions barring Wallace's disclosure of "confidential information," including "personnel or corporate" information, which the ALJ found to be unlawful, would ensure that, even after his removal, Wallace would not talk to other employees about their terms and conditions of employment. (ALJD 43:4-43:22; 43:28-43:41). A provision barring Wallace from making "disparaging remarks" or "tak[ing] action now, or at any time in the future, which could be detrimental to the Released Parties," which was also found to be unlawful by the ALJ, would further restrict Wallace's ability to criticize the employer who unlawfully discharged him to other employees, to the Union, to third parties, or to the public. (ALJD 43:24-43:26; 43:43-44:13)

This context renders the Separation Agreement's limitation on Wallace's ability to disclose the terms of the Separation Agreement to anyone but a very limited set of individuals particularly coercive and impactful. Although the Board's Division of Operations-Management has enunciated guidelines stating that agreements "that contain clauses prohibiting discriminatees from generally disclosing the financial terms of a settlement continue to be appropriate," those guidelines to not extend to agreements broadly prohibiting discriminatees from discussing the terms of an agreement in its entirety. Division of Operations-Management Memorandum OM 07-27, "Non-Board Settlements" (Dec. 27, 2006). The rule in Respondent's Separation Agreement barring Wallace from discussing the terms of the Agreement would prevent Wallace from exercising his Section 7 right to communicate with other employees, the Union, third parties, or the public about the fact that he received any semblance of recourse for Respondent's

highly visible and unlawful action. The General Counsel therefore respectfully urges the Board to find that the inclusion of this term in the Separation Agreement presented to Wallace was unlawful.

G. A Make Whole Remedy for Discriminatee Wallace Must Include Reimbursement of Search-for-Work Expenses, Regardless of Whether Those Expenses Exceed Any Interim Earnings

As specifically requested in the Complaint, in addition to being entitled to all traditional remedies for an unlawful discharge, discriminatee Wallace is entitled to be made whole for search-for-work and work-related expenses regardless of whether these amounts exceed any interim earnings. Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment[1]; the cost of tools or uniforms required by an interim employer[2]; room and board when seeking employment and/or working away from home[3]; contractually required union dues and/or initiation fees, if not previously required while working for respondent[4]; and/or the cost of moving if required to assume interim employment.[5]

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect

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[1] *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

[2] *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

[3] *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

[4] *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

[5] *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co.,* 109 NLRB 936, 939 n.3 (1954)("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also N. Slope Mech.*, 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work,[6] but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.,* 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj*, 361 NLRB No. 57 at *2 (Sept. 30, 2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to

[6] *In Re Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006)("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep 't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." *Don Chavas, LLC*, 361 NLRB No. 10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.[7] These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.*, 356 NLRB No. 8 at *1 (Oct. 22, 2010)(interest is to be compounded daily in backpay cases).

[7] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerboxer Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953).

V. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Board grant the General Counsel's limited cross-exceptions, reverse the portions of the ALJ's decision to which the Acting General Counsel has excepted, and provide a full and appropriate remedy for all of Respondent's unfair labor practices

Dated at Phoenix, Arizona, this 7th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** in Case 28-CA-150157 was served by E-Filing and E-mail on this 7th day of April, 2016, on the following:

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